Supreme Court, U.S.
FILED
No. 04 174 AUG 4 - 2004
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

MAYNARD R. JOYCE, *et al.*,

*Petitioners,*

v.

EAST TENNESSEE NATURAL GAS COMPANY,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

Joseph T. Waldo
*Counsel of Record*
Henry E. Howell, III
Guion H. Willis, Jr.
Jeremy P. Hopkins
WALDO & LYLE, P.C.
301 W. Freemason Street
Norfolk, VA 23510
(757) 622-5812

*Counsel for Petitioners*

Michael M. Berger
BERGER & NORTON,
A LAW CORPORATION
12121 Wilshire Boulevard
Suite 1300
Los Angeles, CA 90025
(310) 979-2500

*Counsel for Petitioners*

THE LEX GROUP$^{DC}$ ♦ One Massachusetts Ave., NW ♦ Suite 670 ♦ Washington, DC 20001
(202) 789-2400 ♦ Fax: (202) 789-1911 ♦ www.thelexgroupdc.com

## QUESTION PRESENTED

1. After Congress withheld the extraordinary eminent domain power of immediate possession of private property from private gas companies under the Natural Gas Act, 15 U.S.C. § 717 et. seq., did the district court violate the constitutional separation of powers and usurp the exclusive authority of Congress to delegate the powers of eminent domain when the district court issued an injunction granting East Tennessee Natural Gas Company immediate possession of individuals' property and provided the gas company with federal marshals to enforce possession of the property without further hearing?

## PARTIES TO THE PROCEEDING

Petitioners:

H. Wade Baker, Lola W. Baker, Alva Jackson Horton, Heath Webb, Ronald E. Meadows, Marion C. Meadows, Melvin A. Thomas, Fred Tolley, Guida Tolley, Jerry S. Thomas, Betty B. Thomas, Nancy U. Stanley, William Troy Strickland, Susan M. Strickland, Gregory L. Seibert, Robin Marie Seibert, Thomas C. Williams, Jr., Jeannie B. Williams, Charles K. Webb, Lena Webb, L.J. Rector, Charis Jean Rector, Johnny J. Rector, Joe Rector, Barbara G. Vass, Dossie G.V. Hall (a.k.a. Dossie Shockley Vass), Calvin Hugh Webb, Linvol Oscar Webb, Wendell Wayne Webb, George Lewis Webb, Edward Paul Webb, Roger Lee Webb, Joel Ray Webb, Virginia Otra Martin, Edna Lou Martin Smart, Ellen M. Fulcher, Harvey Glenn Fulcher, John M. Lewis, Cornelia A. Lewis, Dorothea W. Bryant, James A. Keesee, Joanne Richmond Keesee, Maynard R. Joyce, Ervin L. Frazier, Jr., Helen E. Melton, Charlotte A. Edwards, James Walter Foglesong, Glen Stuart Foglesong, Ralph D. Howell, Mabel H. Fulcher, Anissa J. Brady (a.k.a. Anissa Holland), Layton Russell Hancock, John Wendell Hancock, Sonia Lucille Easter, Una Faye Saunders, Wayne Dwight Hancock, Heirs of Royal Early Hancock, Earl R. Potter, Joan A. Potter

Respondent:

East Tennessee Natural Gas Company

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... vi

OPINIONS AND ORDERS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 4

Summary of Argument ..... 4

I. The Fourth Circuit's Holding that a District Court May Use Its "Inherent" Equitable Powers to Grant Private Parties Legislative Powers Belonging to Congress Violates the Constitutional Separation of Powers ..... 5

A. The Fourth Circuit's Decision Erroneously Overlooks the Fundamental Principle of Separation of Powers and Fails to Address Whether the District Court's Exercise of "Inherent" Equitable Powers Violates the Doctrine of Separation of Powers ..... 5

B. The District Court Unconstitutionally Usurped Exclusive Congressional Authority When It Unilaterally Granted ETNG the Quick-Take Power of Eminent Domain and Provided Federal Marshals to Enforce the Grant ..... 6

C. The Fourth Circuit's Opinion that District Courts May Use Rule 65 of the Federal Rules of Civil Procedure to Grant Powers Belonging to Congress Contravenes the Separation of Powers and Repudiates Any Limit on District Courts' "Inherent" Equitable Powers ..... 17

1. Contrary to the Fourth Circuit's Opinion, Rule 65 of the Federal Rules of Civil Procedure Does Not Give District Courts Authority to Grant Powers Belonging to Congress ..... 18

2. Contrary to the Fourth Circuit's Opinion, Congress's "Tacit Approval" of the Federal Rules of Civil Procedure Did Not Empower Courts to Delegate Legislative Powers Belonging to Congress ..... 21

3. Contrary to the Fourth Circuit's Opinion, Private Condemnors May Exercise the Quick-Take Power and Thereby Seize Possession of Property Before Paying Compensation Only When Congress Grants This Power to the Condemnor ..... 22

II. The Fourth Circuit's Opinion Directly Conflicts With the Seventh Circuit's Opinion in Northern Border Pipeline Company v. 86.72 Acres, 144 F.3d 469 (7th Cir. 1998) ..... 23

III. The Fourth Circuit's Sweeping Opinion Will Encourage Parties to Seek Equitable Relief to Obtain Rights and Powers They Did Not Possess at Law and to Which They Had No Substantive Right or Entitlement ..... 28

CONCLUSION ..... 29

## TABLE OF AUTHORITIES

**Page**

**Cases:**

Atlantic Seaboard Corporation v. Van Sterkenburg,
318 F.2d 455 (4th Cir. 1963) ..... 23

Bowsher v. Synar,
478 U.S. 714 (1986) ..... 5

Chapman v. Sheridan-Wyo. Coal Co.,
338 U.S. 621 (1950) ..... 26

Cherokee Nation v. S. Kan. Ry. Co.,
135 U.S. 641 (1890) ..... 22, 23

Cincinnati v. Vester,
281 U.S. 439, 448 (1930) ..... 7

Commercial Station Post Office v. United States,
48 F.2d 183 (8th Cir. 1931) ..... 23

Duncan v. Kahanamoku,
327 U.S. 304 (1946) ..... 16

East Tennessee Natural Gas Co. v. Sage,
361 F.3d 808 (4th Cir. 2004) ..... passim

East Tennessee Natural Gas Co. v. Sage,
369 F.3d 357 (4th Cir. 2004) ..... 1

First English Evangelical Lutheran Church v.
County of Los Angeles,
482 U.S. 304 (1987) ..... 7

Grupo Mexicano de Desarrollo v.
Alliance Bond Fund, Inc.,
527 U.S. 308 (1999) ..... 16

Heine v. Levee Comm'rs,
86 U.S. (19 Wall.) 655 (1874) ..... 15

INS v. Chadha,
462 U.S. 919 (1983) ..... 6

Johnson v. Collins Entm't Co.,
204 F.3d 573 (4th Cir. 2000) ..... 15, 16

Joslin Mfg. Co. v. Providence,
262 U.S. 668 (1923) ..... 27

Kennedy v. Indianapolis,
103 U.S. 599 (1880) ..... 22

Kirby Forest Indus., Inc. v. United States,
467 U.S. 1 (1984) ..... 8, 9

Kokkonen v. Guardian Life Ins. Co. of America,
511 U.S. 375 (1994) ..... 18

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) ..... 13

Massachusetts v. Mellon,
262 U.S. 447 (1923) ..... 13

Mitchell v. Robert De Mario Jewelry, Inc.,
361 U.S. 288 (1960) ..... 19, 20

Monongahela Navigation Co. v. United States,
148 U.S. 312 (1893) ..... 16, 29

Muskrat v. United States,
219 U.S. 346 (1911) ..... 6, 14

N.Y. Times Co. v. United States,
403 U.S. 713 (1971) ..... 14

Nat'l Fuel Gas Supply Corp. v. 138 Acres,
84 F. Supp. 2d 405 (W.D.N.Y. 2000) ..... 10

Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.,
337 U.S. 582 (1949) ..... 6

New York v. United States,
505 U.S. 144 (1992) ..... 14

Northern Border Pipeline Company v. 86.72 Acres,
144 F.3d 469 (7th Cir. 1998) ..... passim

Northern Border Pipeline Company v. 127.79 Acres,
520 F. Supp. 170 (D.N.D. 1981) ..... 7, 10

Rees v. City of Watertown,
86 U.S. (19 Wall.) 107 (1874) ..... 26

Roadway Express, Inc. v. Piper,
447 U.S. 752 (1980) ..... 15

Sweet v. Rechel,
159 U.S. 380 (1895) ..... 22, 23

Tenn. Valley Auth. v. Hill,
437 U.S. 153 (1978) ..... 20

United States v. 640.00 Acres,
756 F.2d 842 (11th Cir. 1985) ..... 8

United States v. Brown,
381 U.S. 437 (1965) ..... 5

United States v. Carmack,
329 U.S. 230 (1946) ..... 8

United States v. Dow,
357 U.S. 17 (1958) ..... 9

United States v. Lopez,
514 U.S. 549 (1995) ..... 6

Winger v. Aires,
89 A.2d 521 (Pa. 1952) ..... 4

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) ..... passim

**Constitutional Provisions:**

U.S. CONST. art. I, § 1 ..... 2, 7

U.S. CONST. art. III, § 2, clause 1 ..... 18

**Statutes:**

10 U.S.C. § 2538 ..... 2, 11

10 U.S.C. § 2663 ..... 2, 11

15 U.S.C. § 717 et. seq. ..... 2

15 U.S.C. § 717f ..... 2

15 U.S.C. § 717f(h) ..... 2, 11

16 U.S.C. § 425a ..... 2, 11

16 U.S.C. § 430k ..... 2, 12

28 U.S.C. § 1254 ..... 1, 2

28 U.S.C. § 1292 ..... 3

28 U.S.C. § 2072 ..... 2, 21

33 U.S.C. § 594 ..... 2, 12

40 U.S.C. § 3113 ..... 2, 13

40 U.S.C. § 3114 ..... 2, 9, 12

40 U.S.C. § 3118 ..... 2, 9

42 U.S.C. § 5196 ..... 2, 12

50 U.S.C. § 82 ..... 2, 12

50 U.S.C. app. § 468 ..... 2, 12

**Rules:**

FED. R. CIV. P. 65 ..... passim

FED. R. CIV. P. 65(a) ..... 18

FED. R. CIV. P. 71A ..... 2, 21

Sup. Ct. Rule 14.1(f) ..... 2

**Other Authorities:**

1 William Blackstone, Commentaries .....7

26 Am. Jur. 2d Eminent Domain § 5 (1996) .....7

26 Am. Jur. 2d Eminent Domain § 20 (1996) .....8

## PETITION FOR WRIT OF CERTIORARI

Petitioners, listed above, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-captioned matter on March 22, 2004.

## OPINIONS AND ORDERS BELOW

The March 22, 2004 opinion of the United States Court of Appeals for the Fourth Circuit is reported at 361 F.3d 808 (4th Cir. 2004) and reprinted in the Appendix ("App.") at 1a. The May 14, 2004 en banc judgment and order of the United States Court of Appeals for the Fourth Circuit denying the Petitioners' Petition for Rehearing is reported at 369 F.3d 357 (4th Cir. 2004) and reprinted in the App. at 65a. The July 9, 2003 order of the United States Court of Appeals for the Fourth Circuit denying Petitioners' Motion for Stay and granting Petitioners' Motion to Expedite Appeal is printed in the App. at 36a. The June 6, 2003 supplemental memorandum opinion of the United States District Court for the Western District of Virginia is printed in the App. at 38a. The May 30, 2003 order of the United States District Court for the Western District of Virginia is printed in the App. at 43a. The May 8, 2003 memorandum opinion of the United States District Court for the Western District of Virginia is printed in the App. at 46a.

## JURISDICTION

The Petitioners seek review of the opinion and judgment of the United States Court of Appeals for the Fourth Circuit that was entered in this action on March 22, 2004. The en banc judgment denying the landowners' request for a rehearing was entered on May 14, 2004. The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

*U.S. Const. Art. I, § 1*

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Pursuant to this Court's Rule 14.1(f), the following provisions are set forth in the Appendix:

10 U.S.C. § 2538 in App. at 76a.
10 U.S.C. § 2663 in App. at 78a.
15 U.S.C. § 717f (Natural Gas Act) in App. at 79a (15 U.S.C. § 717f(h), the provision dealing specifically with eminent domain, is in App. at 83a).
16 U.S.C. § 425a in App. at 84a.
16 U.S.C. § 430k in App. at 85a.
28 U.S.C. § 1254 in App. at 86a.
28 U.S.C. § 2072 in App. at 87a.
33 U.S.C. § 594 in App. at 88a.
40 U.S.C. § 3113 in App. at 89a.
40 U.S.C. § 3114 (Declaration of Taking Act) in App. at 90a.
40 U.S.C. § 3118 in App. at 93a.
42 U.S.C. § 5196 in App. at 94a.
50 U.S.C. § 82 in App. at 102a.
50 U.S.C. app. § 468 in App. at 105a.
Federal Rule of Civil Procedure 65 in App. at 110a.
Federal Rule of Civil Procedure 71A in App. at 113a.

## STATEMENT OF THE CASE

In December of 2002, the Respondent, East Tennessee Natural Gas Company ("ETNG") filed complaints for condemnation in the United States District Court for the Western District of Virginia ("district court"), pursuant to the Natural Gas Act, 15 U.S.C. § 717 et. seq. ("NGA"),

seeking to take property owned by the Petitioners ("landowners"). At the same time, ETNG moved the district court to issue an injunction giving ETNG immediate possession of the landowners' property before trial on just compensation and before the payment of compensation as determined at trial. The district court found that the NGA did not provide ETNG with authority to take immediate possession of the landowners' property and that Congress has not delegated private gas companies authority to take immediate possession of property. (App. at 39a).

Despite finding that Congress has not delegated the power to take immediate possession of property (the "quick-take" power) to ETNG, the district court granted ETNG immediate possession of the landowners' property and provided federal marshals to ETNG to enforce the transfer of possession. (App. at 44a). Armed federal marshals went with ETNG employees to the landowners' homes to enforce the grant of immediate possession that the district court created for ETNG. The marshals, at the direction of ETNG, patrolled the landowners' property and has maintained a constant presence throughout construction.

On June 9, 2003, the landowners appealed to the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1292 and, shortly thereafter, moved to stay the district court's ruling pending appeal. The Fourth Circuit denied the Motion to Stay on July 9, 2003. (App. at 36a-37a). On September 25, 2003, the Fourth Circuit heard oral argument on the issue of whether the district court erred in judicially granting the quick-take power to a private company and providing federal marshals to enforce a power that Congress withheld from private gas companies. On March 22, 2004, the Fourth Circuit affirmed the district court's decision. (App. at 1a-35a). The landowners' timely Petition for Rehearing en banc was denied in a published

order issued on May 14, 2004. (App. at 65a-74a). Thereafter, the landowners filed this Petition for Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

### Summary of Argument

The issue in this case is whether district courts may use "inherent" equitable powers to delegate to private parties extraordinary powers of eminent domain that are vested in Congress when Congress has decided to withhold these powers from private gas companies. Eminent domain is a legislative power that is vested in Congress. Congress determines who will exercise the power and how the power will be exercised. Eminent domain has been called a sovereign's "most awesome grant of power." Winger v. Aires, 89 A.2d 521, 522 (Pa. 1952). Thus, to keep that "awesome" power in check, when Congress delegates the power of eminent domain, the statutes are strictly construed to exclude those powers not expressly granted.

The district court acknowledged that Congress has not granted private gas companies the extraordinary quick-take power.[1] Contrary to its own interpretation of the law, the district court invoked its "inherent" equitable powers to grant ETNG the quick-take power that Congress withheld and compounded its error by providing armed federal marshals to seize and maintain control of the land for the benefit of ETNG. Such judicial fiat violates the constitutional separation of powers and eschews all limits on the "inherent" equitable powers of district courts.

---

[1] The quick-take power is an extraordinary power of eminent domain that is additional to the ordinary power of eminent domain. It authorizes condemnors to seize possession of a landowner's property before providing the landowner with just compensation.

The Fourth Circuit's opinion upholding such judicial action will have grave and far-reaching implications spanning far beyond the purview of eminent domain. The opinion erodes the constitutional structure of government. The opinion poses a serious threat to the rights and liberties of individuals because it authorizes district judges to grant extraordinary legislative powers to private parties despite Congress's decision to withhold such powers from private parties.

The Fourth Circuit's decision creates direct conflict with the Seventh Circuit's decision in Northern Border Pipeline Company v. 86.72 Acres, 144 F.3d 469 (7th Cir. 1998). See supra § II.

## I. The Fourth Circuit's Holding that a District Court May Use Its "Inherent" Equitable Powers to Grant Private Parties Legislative Powers Belonging to Congress Violates the Constitutional Separation of Powers

### A. The Fourth Circuit's Decision Erroneously Overlooks the Fundamental Principle of Separation of Powers and Fails to Address Whether the District Court's Exercise of "Inherent" Equitable Powers Violates the Doctrine of Separation of Powers

The Fourth Circuit ignored the constitutional doctrine of separation of powers. Consequently, it issued an opinion that violates this essential structural protection against excessive and arbitrary power. See Bowsher v. Synar, 478 U.S. 714, 721-22 (1986) (the purpose of separation of powers is to "diffuse power the better to secure liberty"). The separation of powers among three coordinate branches of government is a vital structural protection in our constitutional system of government. United States v. Brown, 381 U.S. 437, 442-43 (1965) (separation of powers is "a bulwark against tyranny"). "The doctrine of separation of

powers was not mere theory; it was felt necessity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring). It "is fundamental in our system." Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590 (1949).

The "constitutionally mandated division of authority [i.e., separation of powers and federalism] was adopted by the Framers to ensure protection of our fundamental liberties [and] to prevent the accumulation of excessive power in any one branch." United States v. Lopez, 514 U.S. 549, 552 (1995). "To preserve . . . and maintain the separation of powers, the carefully defined limits on the power of each branch must not be eroded." INS v. Chadha, 462 U.S. 919, 957-58 (1983). This Court has repeatedly affirmed that the Constitution forbids one branch of government from undermining and usurping the powers of another. Muskrat v. United States, 219 U.S. 346, 352 (1911).

Even in times of crisis and emergency, this Court has not let the exigencies of the crisis prevent the Court from enforcing the separation of powers that is at the center of the constitutional framework. Youngstown, 343 U.S. at 582-89. However, over the landowners' vigorous objections, both the district court and the Fourth Circuit ignored the separation of powers and failed to address this critical issue. The Fourth Circuit's opinion authorizes district courts to take extraordinary actions that erode the constitutional separation of powers for the benefit of a private party.

### B. The District Court Unconstitutionally Usurped Exclusive Congressional Authority When It Unilaterally Granted ETNG the Quick-Take Power of Eminent Domain and Provided Federal Marshals to Enforce the Grant

Congress withheld the quick-take power from private companies such as ETNG, and the dictates of separation of

powers prohibit district courts from unilaterally granting these powers to private gas companies. The United States Constitution vests "[a]ll legislative Powers . . . in . . . Congress." U.S. Const. Art. I, § 1. Eminent domain is a legislative power that belongs to Congress. See Youngstown, 343 U.S. at 585-589; see also First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987); 1 William Blackstone, Commentaries *139-40 (explaining that "the legislature alone" controls and directs the power of eminent domain and that "nothing but the legislature can perform [this power"]).

Congress controls and directs the exercise of the power of eminent domain. Youngstown, 343 U.S. at 585-589. Congress determines who will exercise the power, and Congress determines how a party will exercise the power. Id.; see also 26 Am. Jur. 2d Eminent Domain § 5 (1996) (collecting cases) (explaining that "under the separation of governmental powers . . . it is the province of the legislature to prescribe how and by whom the power of eminent domain is to be exercised").

When Congress delegates powers of eminent domain either to governmental bodies or to private companies, the "statutes conferring the right of eminent domain are strictly construed to exclude those rights not expressly granted." N. Border Pipeline Co. v. 127.79 Acres, 520 F. Supp. 170, 172 (D.N.D. 1981) (interpreting the NGA). Moreover, condemnors must exercise the power of eminent domain in strict compliance with the procedures and methods the legislature prescribes. Cincinnati v. Vester, 281 U.S. 439, 448 (1930). These principles have been found in the most elementary of texts.

> Statutes conferring the power of eminent domain are subject to strict construction against the one exercising the power and in favor of the landowner, because the power of eminent domain is one of the most harsh proceedings known to the law. Such statutes are not to be extended or broadened by inference or implication or by judicial construction. . . . and when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained. . . . [W]hen the matter is doubtful, it must be resolved in favor of the property owner.

26 Am. Jur. 2d Eminent Domain § 20 (1996) (footnotes omitted) (emphasis added) (collecting cases).

Congress may delegate eminent domain power to governmental bodies or to an arm of the sovereign to take property on behalf of or in the name of the sovereign. Congress may also delegate such power to a private party who may take property for and on behalf of itself. Delegations of eminent domain power to private parties, however, "are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied." United States v. Carmack, 329 U.S. 230, 243 n.13 (1946).

Additionally, there are two distinct types of eminent domain power: (1) the ordinary power of eminent domain, also referred to as "straight condemnation," and (2) the extraordinary quick-take power of eminent domain. See Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 3-6 (1984) (discussing powers of eminent domain and stating that the United States government or Congress may take immediate possession of property); see also United States v. 640.00 Acres, 756 F.2d 842, 844 (11th Cir. 1985). A condemnor possessing the ordinary power of eminent

domain is authorized to take possession of property only after trial and payment to the landowner of just compensation as determined at trial.[2] Kirby Forest, 467 U.S. at 3-6. A condemnor possessing quick-take power is authorized to seize property before trial and before the condemnor provides just compensation to the landowner.[3] Id.

The extraordinary quick-take authority is separate from and in addition to the ordinary power of eminent domain. See 40 U.S.C. § 3118 (2004) ("The right to take possession and title in advance of final judgment in condemnation proceedings as provided by [40 U.S.C. § 3114] is in addition to any right, power, or authority conferred by [other] laws."); (App. at 93a).

Consistent with the constitutional structure of government that vests all legislative power in Congress and in accord with general legal principles of eminent domain, Congress, not the judiciary, determines whether to grant the extraordinary quick-take power or only the ordinary power of eminent domain. Youngstown, 343 U.S. at 582-589. With few exceptions, Congress has been careful to reserve the extraordinary quick-take power to the sovereign. See, e.g., United States v. Dow, 357 U.S. 17, 21 (1958) (explaining that "the Government may either employ statutes which require it to pay over judicially determined compensation before it can enter upon the land, or proceed under other statutes which enable it to take immediate possession") (emphasis added); see also Kirby Forest, 467 U.S. at 4-6 (stating that the

---

[2] At the conclusion of the condemnation trial, the condemnor obtains an option to buy the property at the price determined at trial to be just compensation. Id. Upon payment of compensation, title vests in the condemnor, and the condemnor may take possession of the property.

[3] The condemnor deposits into court an amount it unilaterally believes to be just compensation and thereafter takes immediate possession of a landowner's property. Kirby Forest, 467 U.S. at 3-6.

government and Congress may seize possession of property before providing just compensation).

In this case, Congress has not granted ETNG the quick-take power. All parties, the district court, and the Fourth Circuit agree that Congress has not granted this extraordinary power to private gas companies. East Tennessee Natural Gas Co. v. Sage, 361 F.3d 808, 820, 822-23 (4th Cir. 2004); (App. at 15a, 19a). It is precisely because Congress withheld this power that ETNG asked the district court to invoke and exercise "inherent" equitable powers for its benefit.

Although a number of district courts have impermissibly invoked "inherent" equitable powers to grant private gas companies the quick-take power,[4] these courts have almost universally acknowledged that Congress has not granted the extraordinary quick-take power to private gas companies. See, e.g., N. Border, 520 F. Supp. at 172. Neither the NGA nor any other provision of law grants private gas companies the quick-take power and the concomitant authority to seize possession of property before paying just compensation. As one court aptly summarized in interpreting the NGA:

> No statutory authority exists which would authorize a private party, such as [ETNG], to take immediate possession of the real property prior to the condemnation proceeding. Similarly, the authority to take immediate possession of the property cannot be implied in the mere grant to the plaintiff of the right to eminent domain because the language of Title 15 U.S.C. § 717f(h) is unequivocal. In addition, if an ambiguity were found in the statute the result would not change because statutes conferring the right of

[4] See, e.g., Sage 361 F.3d at 827-828; (App. at 27a-28a); but see Nat'l Fuel Gas Supply Corp. v. 138 Acres, 84 F. Supp. 2d 405, 415 (W.D.N.Y. 2000).

> eminent domain are strictly construed to exclude those rights not expressly granted.

Id.

The legislative grant of the ordinary power of eminent domain in the NGA does not include a grant of the extraordinary and additional quick-take power. See, e.g., N. Border v. 86.72 Acres, 144 F.3d at 471-72 (7th Cir. 1998). "Although [ETNG] possesses the authority pursuant to Title 15 U.S.C. § 717f(h) to exercise the right of eminent domain, this right is not in itself sufficient to authorize the taking of immediate possession prior to the condemnation proceeding itself." Id. Strict construction of statutes delegating the power of eminent domain dictates that powers not granted by Congress are excluded.

In drafting the NGA and other federal eminent domain statutes, Congress made a deliberate decision to withhold the quick-take power from private gas companies such as ETNG.[5] A comprehensive reading of federal eminent domain statutes confirms that Congress chose to withhold this extraordinary power from private gas companies.

When Congress has decided that particular condemnors should wield the quick-take power, it has expressly granted the power. See, e.g., 10 U.S.C. §§ 2538 (President, in war time), 2663 (Secretary of a military department, in war time); 16 U.S.C. §§ 425a (Secretary of Interior regarding specified

---

[5] Congress likely withheld the quick-take power from private companies for two reasons. First, unlike the sovereign, private entities are not backed by the full faith and credit of the federal treasury so as to guarantee owners just compensation. If a private company becomes insolvent before final judgment and payment, a result now thinkable in the wake of the Enron debacle, the owners will suffer irreparable injury. Second, the motivation of a private entity is corporate profit and pecuniary gain while the motivation of government is presumably the good of the people or public interest.

Civil War battlefields), 430k (same); 33 U.S.C. § 594 (Secretary of Army for river and harbor improvements specifically authorized by Congress); 42 U.S.C. § 5196 (FEMA director, to respond to emergencies and disasters); 50 U.S.C. § 82 (President, to procure ships and material during war); 50 U.S.C. app. § 468 (President, in time of war or emergency).

Congress enacted a general quick-take statute, the Declaration of Taking Act ("DTA"), and it expressly reserved the quick-take power exclusively for actions "by and in the name of and under the authority of the United States." 40 U.S.C. § 3114; (App. at 90a). Congress reserved the quick-take power for the United States government alone. Not only does the DTA demonstrate Congress's intent to withhold the quick-take power from private parties, but it also demonstrates that district courts are not authorized to grant the quick-take power. If district courts were empowered to unilaterally authorize the use of quick-take power through injunctive relief, the DTA would have been unnecessary, as would each of the specific statutes noted above.

This Court has held that not even the President of the United States, in times of crisis and emergency, may seize immediate possession of property without legislative authorization to do so. Youngstown, 343 U.S. at 585-89. When the executive branch declared an emergency and seized the nation's steel mills without legislative authorization, the Court recognized that separation of powers restrains the use of eminent domain powers, which the Constitution places in the legislative branch alone. Id. at 582-589.

In Youngstown, the President possessed the ordinary power of eminent domain.[6] Id. at 585-86. Importantly, however, Congress had not authorized the President to seize immediate possession of property under the circumstances involved therein. Id. at 585-89. Because Congress had not authorized the President to seize immediate possession of the property, the Court did not permit the President to do so. Id. Likewise, ETNG lacks authority to exercise the quick-take power unless Congress specifically authorizes it to do so.

The district court violated the separation of powers when it unilaterally granted legislative powers belonging to Congress and authorized ETNG to seize immediate possession of the subject properties.

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. . . . [N]either department may invade the province of the other.

Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). As Chief Justice Marshall articulated early in the Court's history, "it is emphatically the duty and province of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). Implicit in the court's designated role of interpreting laws and declaring their meaning is the clear

---

[6] In addition to the statutes this Court cited in footnote two in Youngstown, the President also could have exercised the ordinary power of eminent domain through 40 U.S.C. § 3113 (formerly 40 U.S.C. § 257), which authorizes "an officer of the federal government" to take property for "public uses" when the "officer believes it is necessary . . . to do so."

restriction that courts may not affirmatively grant or exercise governmental powers of legislation or execution.

This Court has warned that courts should "carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to [the courts] by the Constitution." Muskrat, 219 U.S. at 352-58. "[F]rom its earliest history [this Court] has consistently declined to exercise any powers other than those which are strictly judicial in their nature." Id. at 356. The Constitution divides government into three distinct and independent branches, and "it is the duty of each to abstain from, and to oppose, encroachments on [the others]." Id. at 352.

"[T]he Constitution . . . did not provide for government by injunction in which the courts . . . can make law without regard to the action of Congress. . . . [C]onvenience and political considerations of the moment do not justify a basic departure from the principles of our system of government." N.Y. Times Co. v. United States, 403 U.S. 713, 742 (1971) (per curiam). "The Constitution's division of power among three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." New York v. United States, 505 U.S. 144, 182 (1992). Here, the lower courts exercised legislative powers, clearly invading the province of Congress.

Unlike other cases in equity in which the court simply fashions a remedy, the district court in this case actually used equity to delegate a legislative power of eminent domain that is vested in Congress. This power was not the court's to delegate. The district court arbitrarily stripped the landowners of their precious property rights—rights upon which many of the landowners (farmers) rely for their livelihood. Ignoring the constitutional separation of powers, the Fourth Circuit upheld the district court's actions.

Where, as here, a district court's "inherent" equitable powers collide with constitutional restraints, the former should yield to the latter.[7]

> The total failure of ordinary remedies does not confer upon the court of chancery an unlimited power to give relief. . . . [T]he hardship of the case and the failure of the mode of procedure established by law is not sufficient to justify a court of equity to depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles.

Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) 655, 658 (1874). While Congress chose to grant ETNG the ordinary power of eminent domain, it has chosen not to grant ETNG the extraordinary quick-take power. It is for Congress, not the courts, to grant the extraordinary quick-take power if it desires ETNG to wield such power.

In this case, the courts forced the constitutional separation of powers to yield to the district court's "inherent" equitable powers. Such judicial fiat "has no logical stopping point." Johnson v. Collins Entm't Co., 204 F.3d 573, 575 (4th Cir. 2000) (en banc).

> Inherent power wielded by life-tenured judges without authorization in statute . . . goes too far. Equity jurisdiction does not vest federal courts with a general power to grant relief whenever the legal remedies are not practical and efficient because it would literally place the whole rights and property of the community under the arbitrary will of the judge.

---

[7] Additionally, "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-765 (1980).

Id. (citing Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 332 (1999) (emphasis added)). A district court's use of equitable powers to affirmatively grant legislative powers and expand the power of government over the people, as occurred here, truly is the "most formidable instrument of arbitrary power that could well be devised." Grupo Mexicano, 527 U.S. at 332.

"It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893). "Courts . . . were set up by our founders to protect the liberties they valued." Duncan v. Kahanamoku, 327 U.S. 304, 322 (1946). While much disagreement about the role and activism of the courts exists, courts clearly pose the most danger to the people when they unilaterally expand the scope and power of government over the people.

The district court, with the Fourth Circuit's subsequent approval, judicially created and granted to a private gas company extraordinary powers that Congress chose to withhold from private gas companies. The district court's actions represent judicial activism of the most dangerous type, as the judge unilaterally authorized a private party to wield extraordinary powers against the people. The district court's actions and the Fourth Circuit's opinion upholding the same violate the constitutional separation of powers, and the implications of the decision pose a serious threat to the rights and liberties of the people.

### C. The Fourth Circuit's Opinion that District Courts May Use Rule 65 of the Federal Rules of Civil Procedure to Grant Powers Belonging to Congress Contravenes the Separation of Powers and Repudiates Any Limit on District Courts' "Inherent" Equitable Powers

The district court defended its decision with the assertion that because Congress did not grant private gas companies the quick-take power, district courts were somehow authorized to grant them that which Congress had not. The district court stated, "Congress did not give a private condemnor the right to immediate possession so that this issue would be left to the courts to consider on a case-by-case basis." (App. at 39a). This unsupported assertion, which the Fourth Circuit embraced, opens the floodgates of the most destructive form of judicial activism; it presumes that Congressional silence constitutes the delegation of authority to the courts to delegate legislative powers to private parties. The district court implied this grant of authority even though there is no legislative history or any other authority which suggests that Congress intended to delegate to district courts the authority to delegate the quick-take power.

The Fourth Circuit's rationale is equally disturbing, as it rejects any notion of limitations on the "inherent" equitable powers of federal courts. The Fourth Circuit has expanded the judiciary's "inherent" equitable powers in derogation of Congress's legislative decision whether to grant private gas companies the most extreme form of the already "awesome" power of eminent domain—the quick-take power. The Fourth Circuit concluded that district courts are authorized to use Rule 65 to grant the quick-take power in the form of injunctive relief. Sage, 361 F.3d at 824; (App. at 23a). This conclusion is flawed because it ignores the structural protections, such as the separation of powers, contained in the Constitution. The Constitution and the doctrine of

separation of powers do prohibit district courts from using Rule 65 to grant powers belonging to the legislature.

### 1. Contrary to the Fourth Circuit's Opinion, Rule 65 of the Federal Rules of Civil Procedure Does Not Give District Courts Authority to Grant Powers Belonging to Congress

The Fourth Circuit's opinion begins with the false premise that district courts are authorized to grant relief under Rule 65 in all situations where Congress or the Constitution has not expressly precluded the courts from taking such action. Sage, 361 F.3d at 824, 828; (App. at 23a, 29a-30a). This analysis ignores the structural protections of separation of powers and federalism and turns Article III, § 2, clause 1 of the Constitution on its head. Under that constitutional provision, district courts have only the powers the Constitution or Congress authorizes. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). Courts are certainly not authorized to act in contravention of the Constitution.

The Fourth Circuit treats Rule 65 as a blank check for exercising unrestrained equitable power. The Fourth Circuit held that district courts may use Rule 65 to grant private parties the quick-take power "[b]ecause Congress has not acted to restrict the availability of Rule 65(a)'s equitable (injunctive) remedy in an NGA condemnation." Sage, 361 F.3d at 824; (App. at 23a).

Instead of inquiring whether the district court had authority to grant the requested relief, the Fourth Circuit held that the district court had authority to grant ETNG the quick-take power because Congress had not expressly prohibited it. Id. The Fourth Circuit established the precedent that district courts are empowered to grant

equitable relief in any situation where Congress fails to specifically restrict the court's "inherent" equitable powers under Rule 65.

However, federal courts cannot act in violation of the constitutional separation of powers, regardless of whether such action is in the form of injunctive relief under Rule 65 or otherwise. The doctrine of separation of powers prohibits courts from taking any actions that invade the province of the other branches of government. The form of the court's actions does not somehow brand the court's impermissible actions with constitutional legitimacy. To permit district courts to exercise legislative powers in any form, including injunctive relief under Rule 65, is to permit the courts to impermissibly usurp legislative powers.

The Fourth Circuit cites Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 299 (1960) for the proposition that "[e]quitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." Sage, 361 F.3d at 824; (App. at 23a). However, Mitchell cannot be read as authorizing district courts to take actions that exceed constitutional restraints.[8] No judicial opinion, act of Congress, or rule of procedure can authorize acts that are repugnant to the Constitution.

---

[8] Mitchell is also easily distinguishable. In Mitchell, Congress expressly authorized equitable relief. Mitchell 361 U.S. at 291-92. Here, Congress has not expressly authorized equitable relief. In Mitchell, Congress specifically entrusted courts of equity with enforcement of the regulatory enactments at issue, and the Court merely fashioned a remedy for a violation of those enactments. Id. at 291-92. Here, the district court went beyond fashioning a remedy; it created new rights and granted powers belonging to the legislature. In Mitchell, the court carried out the policy of the legislature. Here, the district court unilaterally altered the policy of the legislature. Finally, in Mitchell, the non-moving party had violated the rights of the party seeking relief. Here, the landowners did not violate any rights of ETNG. Instead, the landowners sought to maintain possession of their property.

Mitchell does not authorize district courts to issue injunctive relief that invades the province of the legislature. Courts cannot use equity to subvert the law or to escape constitutional restraints placed upon the powers of the federal courts. Specifically in this field, it has been repeatedly held that the grant of eminent domain power is strictly construed against the condemning agency to restrict its powers. See supra § IB.

Citing Rule 65 is an unpersuasive attempt to justify the district court's unconstitutional actions. Judicial actions pursuant to Rule 65 are not immune from constitutional restraints. The Fourth Circuit may believe that the district court's decision to grant the quick-take power was more expedient than Congress's decision to withhold the power, but that does not give courts license to ignore the Constitution.

> [The Court's] individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with common sense and the public weal. Our Constitution vests such responsibilities in the political branches.

Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978).

If Congress's decision to withhold the quick-take power from private gas companies is a bad policy decision, it is up to Congress—not the courts—to amend the NGA.

**2. Contrary to the Fourth Circuit's Opinion, Congress's "Tacit Approval" of the Federal Rules of Civil Procedure Did Not Empower Courts to Delegate Legislative Powers Belonging to Congress**

Both the district court and the Fourth Circuit were unable to identify any legislative delegation of the quick-take power to private gas companies. The reason is simple: there is none. Nevertheless, the Fourth Circuit held that Rule 65 empowers courts to delegate legislative powers such as the quick-take power. The Fourth Circuit asserted that because "[n]either the Constitution, nor Congress, nor Rule 71A bars this sort of relief [i.e., an injunction granting ETNG the quick-take power] in a condemnation case," courts may delegate the quick-take authority through injunctive relief. Sage, 361 F.3d at 828; (App. at 29a-30a).

The Fourth Circuit relied on Congress's "tacit approval" of the Federal Rules of Civil Procedure for alleged authorization to use Rule 65 to delegate the legislative quick-take power. Sage, 361 F.3d at 824; (App. at 23a). Congress surely did not intend to grant courts the authority to delegate legislative powers when it "tacitly" approved the Federal Rules of Civil Procedure. After all, the very enabling act declares that the rules shall not enlarge any substantive rights. 28 U.S.C. § 2072; (App. at 87a).

The Fourth Circuit's reasoning has no logical stopping point to excessive and arbitrary judicial power wielded under the guise of Rule 65, as it assumes that courts are entitled to delegate any legislative powers that Congress has not specifically precluded courts from delegating. Instead of determining whether Congress actually granted a particular right or power, courts may now unilaterally create and grant a right or power, as long as Congress did not expressly prohibit the court from granting the particular

right or power. Sage, 361 F.3d at 824, 828; (App. at 23a, 30a). This reasoning destroys any notion of separation of powers.

The Fourth Circuit's overly expansive reading of the Federal Rules of Civil Procedure empowers courts to substitute their will, in delegating legislative powers, for that of Congress. The Fourth Circuit's decision will have far-reaching consequences that will bedevil the judicial system—not to mention the body politic—for years to come. The better course would be to stifle the concept now, before it hardens into precedent and emboldens other activists to act in a multitude of factual scenarios.

### 3. Contrary to the Fourth Circuit's Opinion, Private Condemnors May Exercise the Quick-Take Power and Thereby Seize Possession of Property Before Paying Compensation Only When Congress Grants This Power to the Condemnor

The Fourth Circuit stated that "the Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid." Sage, 361 F.3d at 824 (citing Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641 (1890)); (App. at 22a). While this is a true statement of the law, it is not a complete statement of the law. A condemnor may seize immediate possession of property before providing the owner just compensation but only when the legislature has granted it the power and authority to do so.

Significantly, in Cherokee and its progeny, Congress or the appropriate legislative body expressly granted the quick-take power to the party seeking to take immediate possession of property prior to paying compensation. See, e.g., Sweet v. Rechel, 159 U.S. 380 (1895) (the legislature authorized the city to seize immediate possession); Kennedy v. Indianapolis, 103 U.S. 599, 599-600 (1880) (the legislature

"authorized . . . the [condemnor] to enter upon, take possession of, and use any lands necessary for the prosecution and completion of the work"); Cherokee, 135 U.S. at 659 (the legislature authorized the condemnor to take possession of the property pending appeal from the award of just compensation as determined by referees at trial).

As this Court acknowledged in Sweet, "it is competent for the legislature, in the exercise of . . . its power to appropriate private property for public uses, to authorize the city to take the fee in the lands . . . prior to making compensation." 159 U.S. at 407 (emphasis added). Cherokee does not stand for the proposition that district courts may grant the quick-take power in the absence of legislative authorization. Rather, Cherokee and its progeny demonstrate that the legislature, not the courts, may grant the quick-take power when the legislature deems it necessary.[9]

## II. The Fourth Circuit's Opinion Directly Conflicts With the Seventh Circuit's Opinion in Northern Border Pipeline Company v. 86.72 Acres, 144 F.3d 469 (7th Cir. 1998)

The Fourth Circuit's opinion directly conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in Northern Border Pipeline Company v. 86.72 Acres, 144 F.3d 469 (7th Cir. 1998). The Federal Energy

---

[9] ETNG may claim that the Eighth Circuit delegated the quick-take power to the United States in Commercial Station Post Office v. United States, 48 F.2d 183 (8th Cir. 1931). However, a close reading of the facts of that case reveals that the court granted the condemnor possession of the property pending appeal, which was after trial and payment of compensation.

Any reliance on Atlantic Seaboard Corporation v. Van Sterkenburg is likewise misplaced because the court in that case merely authorized the condemnor to take possession of the property only after trial and after payment of just compensation as determined at trial. 318 F.2d 455, 459-60 (4th Cir. 1963).

Regulatory Commission ("FERC") granted Northern Border Pipeline Company ("Northern Border") a "federal certificate of necessity," thus giving it the right to take property through the ordinary power of eminent domain granted in the NGA. Id. at 470. "Not content with the pace of an ordinary eminent domain proceeding, Northern Border moved for immediate possession." Id.

Because Congress has not granted private gas companies the quick-take power, Northern Border, like ETNG, asked the district court to invoke its "inherent" equitable powers and grant Northern Border the quick-take power through mandatory injunctive relief. Id. The district court refused to grant Northern Border the quick-take power, holding that Northern Border "has no legal right to immediate possession [of the owners' property]." Id. at 471.

The Seventh Circuit upheld the district court's opinion, declaring that Northern Border's request for equitable relief "misapprehends the relief available in preliminary injunctive proceedings." Id. The Seventh Circuit explained that Northern Border mistakenly believed that its "lack of quick-take authority should not defeat [its] request for a preliminary injunction." Id. at 472. However, "[a] preliminary injunction may issue only when the moving party has a substantive entitlement to the relief sought." Id. at 471 (emphasis added). Northern Border had no right or entitlement to seize possession of the landowners' property until after trial and payment of compensation because it lacked the quick-take power. Id.

The Seventh Circuit aptly recognized the difference between the ordinary power of eminent domain and the extraordinary quick-take power. Because Congress has granted private gas companies only the ordinary power of eminent domain, these companies have no right or entitlement to exercise the quick-take power. Id. at 471-72.

Private gas companies have no power or authority to seize possession of a landowner's property *before paying the* landowner just compensation. Id.

The Seventh Circuit explained that a gas company's "rights to the [owners'] land do not vest when the FERC issues it a certificate [of necessity]." Id. at 471. The court then held that "[b]ecause [Northern Border] disavow[ed] any claim that it has a substantive entitlement to the defendants' land right now, rather than an entitlement that will arise at the conclusion of the ordinary eminent domain process, Northern Border is not eligible for the relief it seeks." Id.

Similarly, ETNG has no right or entitlement to seize possession of the landowners' property until after it has provided just compensation. Like Northern Border, ETNG can point to no legislative grant that gives it the power or authority to seize possession of the landowners' property before providing the landowners just compensation. ETNG possesses only the ordinary power of eminent domain; it does not possess the additional quick-take power. Thus, it has a right or entitlement to take possession of the landowners' property only after payment of compensation at the conclusion of the ordinary eminent domain process.

The Fourth Circuit futilely attempts to distinguish the Seventh Circuit's decision in Northern Border. The court argues that Northern Border is not analogous because the gas company in that case did not have an "order determining that it had the right to condemn." Sage, 361 F.3d at 827; (App. at 29a). However, the Seventh Circuit's opinion did not turn on any such purported order, nor do the facts of that case indicate any lack of such order. See generally N. Border, 144 F.3d at 469. In fact, the Seventh Circuit never discussed or even mentioned an order confirming the right to take. See id.

The Fourth Circuit not only misapprehends the Northern Border decision, but it also misapprehends the effect of an order of condemnation. An order of condemnation merely establishes that a condemnor possesses the power of eminent domain and that the condemnor is authorized to take property in accordance with the powers it possesses. Such an order does not authorize district courts to bestow any additional powers, such as the quick-take power, on condemnors. It merely allows ordinary condemnation to proceed.

The Seventh Circuit cogently explained its rationale, and its decision speaks for itself. The Seventh Circuit explained that the "district court had no authority to enter a preliminary injunction awarding immediate possession" because Northern Border did not have a right to seize possession of the landowners' property until after the "conclusion of the ordinary eminent domain process." Id. at 471 (emphasis added). The Seventh Circuit correctly concluded that Congress's grant of the ordinary power of eminent domain does not authorize courts in equity to grant the additional quick-take power. Northern Border lacked the quick-take power and thus had no right to seize possession of the landowners' property before trial and before payment of compensation determined at trial.

The Seventh Circuit applied fundamental precepts of equity that comport with separation of powers. Courts of equity fashion remedies for existing rights, but they cannot create new rights. Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 122 (1874). Courts of equity "can intervene only where legal rights are invaded or the law violated." Chapman v. Sheridan-Wyo. Coal Co., 338 U.S. 621, 631 (1950). In Northern Border, just as in this case, the gas company lacked a right or entitlement to seize immediate possession of the landowners' property.

Even the Fourth Circuit was constrained to admit that ETNG's authority to take possession of the landowners' property does not arise until after payment of just compensation. The Fourth Circuit stated that "[o]nce the right to condemn is established by court order, it follows that the company will be entitled to possession when title is transferred at the end of the case." Sage, 361 F.3d at 825 (emphasis added); (App. at 24a). The "right to condemn," i.e., the ordinary power of eminent domain, authorizes a condemnor to proceed with acquisition but not to seize possession of property until after payment of just compensation.

Contrary to the Seventh Circuit's decision in Northern Border, the Fourth Circuit's decision establishes that when Congress grants a private gas company the ordinary power of eminent domain, courts of equity are authorized to unilaterally grant the additional quick-take power. Congress, through its deliberative process, chose not to subject the rights of individual property owners to private gas companies that would wield the extraordinary quick-take power.[10] The Fourth Circuit chose otherwise and approved the district court's decision to substitute its will for that of Congress.

The Seventh Circuit correctly applied principles of separation of powers, equity, and eminent domain jurisprudence. The Fourth Circuit created new standards that are contrary to these longstanding, foundational principles. Consequently, a split in the circuits now exists, and only this Court can resolve it.

---

[10] For farmers struggling to make a living, the promise of payment after trial, which may be three or more years from the date ETNG seized their property, is of small solace. At least if the farmers were paid before ETNG destroyed the use of portions of their property, they could immediately purchase other productive land to continue their farm or business. Additionally, the lost income suffered by these farmers is unrecoverable. Joslin Mfg. Co. v. Providence, 262 U.S. 668, 675 (1923).

## III. The Fourth Circuit's Sweeping Opinion Will Encourage Parties to Seek Equitable Relief to Obtain Rights and Powers They Did Not Possess at Law and to Which They Had No Substantive Right or Entitlement

The Fourth Circuit's overly broad interpretation of the district court's equitable powers and its seemingly limitless view of the courts' ability to issue injunctive relief under Rule 65 invites parties to seek injunctive relief to obtain new substantive rights or powers which the parties lack at law. Until now, a party seeking injunctive relief had to first show they had a substantive right or entitlement to the relief sought. N. Border, 144 F.3d at 471. The Fourth Circuit has done an end-run around that sensible rule and established a new rule.

Under the Fourth Circuit's rule, courts may now grant legislative powers or rights to private corporations even in the face of Congress's decision to withhold these powers or rights. The Fourth Circuit has freed courts in equity to venture far beyond fashioning a remedy for an existing right; courts may now bestow new rights and powers on private parties. More importantly, courts are now free to delegate legislative powers belonging to Congress.

The implication of this decision is that the constitutional separation of powers does not limit courts. District courts are authorized to go beyond the unambiguous language of a statute to reach a result the court desires in a particular case. Parties will rely on this decision and call upon courts to exercise similar judicial activism and unfettered use of equitable powers in other contexts. The extraordinary power given a private gas company will have to be equally extended to any party seeking the extraordinary injunctive power of a federal court in other cases, whether a private individual or corporation.

Under the guise of Rule 65, unelected, life-tenured judges may now dispense powers that are committed to Congress and may thereby affirmatively expand the scope and reach of government over the rights and liberties of the people. This claim of judicial omnipotence violates the separation of powers, subverts the powers of the legislative branch, and threatens the rights of the people. It places legislative powers and the rights, liberties, and property of the people at the will of individual judges wielding unrestrained "inherent" powers.

Such judicial overreaching is impermissible under our constitutional structure of government. As many of the framers feared, district courts' unfettered equitable powers may, in due time, swallow the powers of the other branches of government and pose a most significant threat to the rights and property of the people.

## CONCLUSION

This Court has warned that "[i]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." Monongahela, 148 U.S. at 325. The Fourth Circuit's decision frees courts of equity from almost any restraints, including constitutional restraints. Courts may now exercise their "inherent" equitable powers in contravention of the constitutional doctrine of separation of powers. The Fourth Circuit has authorized district courts to use their "inherent" equitable powers to grant legislative powers of eminent domain that belong to Congress. Moreover, courts may take such extreme action even after interpreting the law and determining that Congress withheld the very powers the court subsequently grants.

The longstanding doctrine of separation of powers will soon yield to the unfettered equitable powers of the courts.

Under the new standards espoused by the Fourth Circuit, the rights and property of the people are no longer protected by law but are subject to the variety and uncertainty of each judge's conscience.

This is no mere hypothetical invasion embellished by hyperbole. The blunt fact is that the district court not only delegated legislative power but enforced its will by sending armed federal marshals to patrol the property under the instruction and supervision of ETNG. Accordingly, the petitioners respectfully request a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review the gross abuse of power in the decision below.

by:_____
Counsel for Petitioners

Joseph T. Waldo*
* Counsel of Record
Henry E. Howell, III
Guion H. Willis, Jr.
Jeremy P. Hopkins
Waldo & Lyle, P.C.
301 W. Freemason Street
Norfolk, VA 23510
(757) 622-5812
Fax: (757) 622-5815
Counsel for Petitioners

Michael M. Berger
Berger & Norton, a Law Corporation
12121 Wilshire Boulevard
Suite 1300
Los Angeles, CA 90025
(310) 979-2500
Fax: (310) 979-2525
Counsel for Petitioners